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Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:) 1 CA-CV 09-0389
)
JAMES EDWIN DALEY,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona rules
) of Civil Appellate
LINDA V. DALEY,) Procedure)
)
Respondent/Appellee.)
)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2006-001069 & FN 2006-070533(Consolidated)

The Honorable William L. Brotherton Jr., Judge

AFFIRMED

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_____ **O R O Z C O**, Judge

¶1 James Edwin Daley (Husband) appeals the family court's denial of his Arizona Rule of Family Law Procedure 85.C motion.¹ For the following reasons, we affirm the judgment of the family court.

FACTS AND PROCEDURAL BACKGROUND

¶2 Linda V. Daley (Wife) and Husband were married in 1989. Husband and Wife's marriage was dissolved on November 1, 2006. In the decree of dissolution (Decree) Husband was ordered to pay spousal maintenance in the sum of \$640 per month for five years, and the spousal maintenance was "modifiable with changed circumstances."

¶3 On April 2, 2008, Husband filed a petition to terminate spousal maintenance (Petition to Terminate). He alleged that there had "been a substantial and continuing change of circumstances as to his ability to earn an income" and pay the spousal maintenance. Husband alleged that his work as a truck driver had decreased substantially due to the economic downturn

¹ Unless otherwise specified, hereafter, an Arizona Rule of Family Law Procedure is referred to as "Rule ____." Additionally, Husband states he is appealing from both the denial of his Rule 85.C motion and the family court's July 30, 2008 Minute Entry, which denied his petition to terminate spousal maintenance. The July 30, 2008 Minute Entry is not signed and therefore, is not a final order. See Rule 81.A ("All judgments shall be in writing and signed by a judge . . . duly authorized to do so."). Husband's Rule 85.C motion, however, requested the same relief as his petition to terminate. Thus, we focus only on the court's denial of Husband's Rule 85.C motion.

and had forced him into early retirement. He also alleged that since he left his employment, he only receives \$1363 per month in Social Security. Husband noted he was actively looking for work after he had been forced into retirement; however, he was unable to find a job.

¶4 An evidentiary hearing on Husband's Petition to Terminate was held on July 30, 2008. Husband testified that immediately prior to his retirement, he was working a reduced schedule of approximately thirty hours a week, which was all his company would give him, earning \$18.71 per hour.² Husband noted that his monthly expenses were more than his income and the difference was paid by his new wife. Husband also testified that, despite his employment situation, he was current with his spousal maintenance payments through April 2008. When asked about his decision to retire, Husband testified that when the plant he was employed at closed, his company relocated him to different plants, which required him to drive farther. Husband stated that his company reduced his hours to the point where he was paying more in traveling costs than what he was earning. As a result, Husband claims he was forced into early retirement because it was the most economically sound decision.

² The family court noted that Husband's pay stubs reflected an hourly rate of \$19.71 and not \$18.71 as Husband had testified.

¶15 Wife testified that, after the divorce, she took a part-time job as a bus monitor on a special needs bus that paid \$8.82 per hour with a maximum of twenty-nine hours per week. Wife also stated she received no overtime, holiday or sick pay and even with the spousal maintenance she would need to get a second job to compensate for the decrease in hours during the summer. She further testified that she had borrowed approximately \$19,000 from her sons for the trailer she lived in and various other expenses.

¶16 After hearing testimony and considering the evidence presented, the family court found Husband had not met his burden and denied his Petition to Terminate. The court stated that if Husband had shown that he was forced into retirement, he might have met his burden. However, the court found that Husband was not forced into retirement, finding instead that he chose to retire and voluntarily reduced his income. The court reasoned that Husband had not done everything in his power to remedy his financial situation. It further found that notwithstanding Husband's assertions that he was forced into retirement, he left his job voluntarily, anticipating his spousal maintenance payment would be reduced as a result. The court also noted that there was no testimony or medical evidence presented by Husband showing that he was not capable of working a full-time job.

¶7 Husband then asked, in the alternative, to reduce the spousal maintenance obligation, but the family court also denied that request.

¶8 More than five months later, Husband filed a Rule 85.C motion for relief from the family court's July 30, 2008 Minute Entry denying his Petition to Terminate. After reviewing the record from the July 30, 2008 hearing, the family court denied Husband's Rule 85.C motion. The family court supported its denial by stating that it found Husband "had retired in order to reduce his spousal maintenance" and that Husband had retired in bad faith. The court stated that even if it had found Husband had retired in good faith, his motion would still have been denied because "even if a substantial change had occurred," such as retirement in good faith, "it had only been a few months since [Husband] left his employment." Therefore, the court found that Husband had not met his burden in showing there had been a substantial and continuing change that warranted a termination or a modification of spousal maintenance.

¶9 Husband timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 and -2101.B (2003).

DISCUSSION

¶10 On appeal Husband argues that: (1) he was treated differently than Wife by the family court in violation of the

Equal Protection Clause of the United States Constitution; (2) he met his burden in the family court to terminate spousal maintenance; (3) retiring is a substantial change in circumstances sufficient to terminate spousal maintenance; (4) his lack of ability, the lack of jobs and the effects of the recession were sufficient to warrant a termination of his spousal maintenance; (5) the family court's decision forces him to work in violation of the Thirteenth Amendment to the United States Constitution; (6) the "threat of incarceration [is] sufficient to chill the right conferred by Congress to retire" on Social Security funds at age sixty-two; and (7) the award of attorney fees to Wife was unreasonable.

¶11 We first note that Husband's arguments regarding the Equal Protection Clause, Thirteenth Amendment and the United States Constitution were not raised before the family court and are therefore waived on appeal.³ *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on

³ Husband argues that he was treated differently by the family court in violation of the Equal Protection Clause of the United States Constitution because Wife's early retirement was condoned while Husband's was not. As we understand Husband's Thirteenth Amendment argument, he contends that courts have recognized people cannot be forced to work to meet child support needs. Husband argues courts should give "similar attention to the needs of older Americans in poor health and unable to find employment."

appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

Substantial and continuing change in circumstances

¶12 Husband argues that his retirement is a substantial change that requires the termination of spousal maintenance and that modification or termination was contemplated by the Decree. Additionally, Husband argues his lack of ability, the lack of available jobs and the effects of the economic recession were sufficient to satisfy his burden to terminate his spousal maintenance.

¶13 In Arizona, an initial determination of spousal maintenance may be modified or terminated "only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327.A (2007). As the petitioning party, Husband has the burden to establish a change in circumstances. *Van Dyke v. Steinle*, 183 Ariz. 268, 274, 902 P.2d 1372, 1378 (App. 1995). The determination of whether there is a sufficient change in circumstances to modify a spousal maintenance award lies within the sound discretion of the family court. *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (App. 1989). On appeal, we review the family court's decision regarding spousal maintenance for an abuse of discretion. *Leathers v. Leathers*, 216 Ariz. 374, 376, ¶ 9, 166 P.3d 929, 931 (App. 2007). We view the evidence in the light most favorable to the party

awarded maintenance and will affirm the award if there is any reasonable evidence to support it. *Id.*

Early retirement not a substantial and continuing change

¶14 The original Decree stated that Husband's spousal maintenance obligations were "modifiable with changed circumstances." Husband places undue emphasis on the Decree's language regarding modification. Because the Decree contemplated modification does not mean that Husband is not required to meet his burden to show a substantial and continuing change pursuant to A.R.S. § 25-327.A. Husband relies on *Chaney v. Chaney*, 145 Ariz. 23, 699 P.2d 398 (App. 1985), for the proposition that his early retirement is a substantial and continuing change that justifies a termination of spousal maintenance. In *Chaney*, the husband retired and subsequently petitioned for modification of his spousal maintenance obligation to his former spouse. 145 Ariz. at 25, 699 P.2d at 400. The family court denied the husband's petition for modification because he failed to show his retirement was involuntary. *Id.* at 27, 699 P.2d at 402. On appeal, this Court remanded to the family court and held that the husband's petition for modification could not be denied on the basis that his retirement was "voluntary." *Id.* The husband in *Chaney* was sixty-five years of age, had "numerous health conditions affecting his ability to work," his retirement was contemplated by both parties and "was not taken in bad faith for

the purpose of reducing [his] obligation to pay spousal maintenance to the wife." *Id.*

¶15 The family court in this case found *Chaney* distinguishable. It noted that if Husband had shown that he was forced into retirement, he might have met his burden. The family court, however, explicitly found that Husband retired in bad faith in order to avoid or eliminate his spousal maintenance obligations. We defer to the family court's determinations of witness credibility as it is in the best position to make such determinations. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

¶16 There is evidence in the record that supports the family court's decision. Husband testified that he was paying approximately \$150 to \$200 per week for gas to travel to work and that he was filling up more frequently as he was travelling to plants farther away from his home. Husband's financial affidavit, however, indicates that he was only spending \$50 per month for gas. Additionally, Husband submitted an exhibit with fourteen photocopied gas receipts; however, seven of the receipts are duplicates. Of the seven original gas receipts Husband submitted, there were two from November 2007, none from December 2007, two from January 2008, none from February 2008, and three from March 2008. These receipts do not support Husband's

testimony that he was spending \$150 to \$200 per week to travel to and from work.

¶17 Husband also testified that prior to his retirement he was working reduced hours, only two to three days per week and sometimes not at all. Husband's pay stubs for the month of January 2008 indicate he worked an average of 31.16 hours per week at a rate of \$19.71 per hour. Husband's average weekly gross wages were \$614.12 and his net wages were \$264.30 per week, or \$1,145.30 per month.⁴ These pay stubs also indicate that Husband was working on average more than thirty hours per week. Wife also testified that with the exception of the week ending March 22, 2008, in which Husband received eight hours of pay, eight hours of holiday pay, and twenty-four hours of vacation pay, Husband's payroll stubs for the month of March 2008 included forty hours each week in addition to overtime.⁵

¶18 Husband also testified that his expenses were \$1900 per month and, with his reduced pay, he earned less than he needed to cover those expenses so his new wife covered the difference. Husband's financial affidavit, however, includes all of the

⁴ \$148.21 was deducted each week from Husband's pay for the court-ordered spousal maintenance. After taxes and the spousal maintenance deduction, Husband received \$264.30 per week x 52 weeks = \$13,743.60. \$13,743.60 divided by 12 months = \$1,145.30.

⁵ The pay stubs Wife referred to are not in the record; however, Husband did not dispute Wife's assertion on cross-examination regarding this statement.

household expenses, including his new wife's expenses, without any indication as to what portion of those monthly expenses she paid. Husband claims he was receiving more on Social Security after he retired than the income he was earning before he retired; however, that was not the case. Husband's net pay before retiring was approximately \$1,785.30 per month. After Husband retired, he received \$1363 per month from Social Security - over \$400 less than he earned while working.

¶19 In his Rule 85.C motion, Husband argued he was forced to retire. The family court disagreed and found that "[Husband's] retirement was [Husband's] decision, no one else's." In denying the Rule 85.C motion, the family court stated that it had "on several occasions questioned the truth and veracity of [Husband's] testimony as it related to his reasons for his retirement" and the "Court found [Husband's] testimony lacked credibility."

¶20 In response to Husband's contention that he was forced into retirement due, in part, to his failing health, the court noted that Husband "presented no medical evidence other than his own testimony to substantiate his claim of a medical disability that would prevent him from working." Attached to Husband's Rule 85.C motion was a doctor's note and an insurance approval letter for a lumbar spine Medical Resonance Imaging (MRI), presumably to document a medical condition. Husband argued that since the

hearing on the Petition to Terminate, "newly discovered evidence ha[d] arisen, which could not have been discovered" prior to the family court's ruling on Husband's Petition to Terminate.

¶21 Pursuant to Rule 85.C.1.b, a court may relieve a party from a final judgment on the ground of "newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 83(D)." Evidence is properly considered newly discovered if: (1) it was in existence at the time of the trial; (2) it was not in the possession by the party seeking relief; (3) the party seeking relief did not know about the evidence; and (4) the evidence was not available to that party. *Soto v. Brinkerhoff*, 183 Ariz. 333, 336, 903 P.2d 641, 644 (App. 1995). Husband knew and could have obtained information about his medical condition and overall medical health at the hearing on the Petition to Terminate. Because Husband knew of this evidence and it was available to him at the time of the hearing, the medical documentation was not newly discovered evidence that would warrant relief pursuant to Rule 85.C.

Husband's lack of ability, jobs and the economic recession

¶22 Husband argues that he cannot find employment because he lacks the skills or ability and jobs are hard to find due to the recession. Husband presented various documents detailing statistics relating to the unemployment rate attached as exhibits

to his Rule 85.C motion. Again, Husband argued that since the hearing on the Petition to Terminate, there had been "newly discovered evidence" that could not have been discovered prior to the family court's ruling on Husband's Petition to Terminate. We note that Husband made the same arguments before the family court at the hearing on the Petition to Terminate. For the reasons stated above, however, this documentation does not satisfy the requirements for newly discovered evidence as Husband knew about this evidence and it was available to him at the time of the hearing on the Petition to Terminate. As this was not newly discovered evidence, the family court properly did not consider or address the documentation.

¶23 Based on the evidence presented, the court had sufficient evidence to find that Husband was not forced into early retirement, and he did not meet his burden for a termination of the spousal maintenance. Therefore, we hold that the family court did not abuse its discretion in denying Husband's petition to reduce or terminate his spousal maintenance obligation.

Social Security

¶24 Husband argues that the "threat of incarceration also brings into question whether the Court is assigning [Husband's] Social Security benefits to [Wife] without a formal written order doing so."

¶25 Federal law prohibits state courts from assigning or transferring a person's right to receive Social Security benefits. See 42 U.S.C. § 407(a) (1998); see also *Kelly v. Kelly*, 198 Ariz. 307, 308, ¶ 5, 9 P.3d 1046, 1047 (2000). Although the federal statute prohibits the attachment of Social Security itself in an order awarding spousal maintenance, this Court has held that a specific award of the value of a portion of the Social Security benefits of the spouse ordered to pay spousal maintenance is permissible so long as it is otherwise equitable. *Leathers*, 216 Ariz. at 378, ¶¶ 15-16, 166 P.3d at 933. In this case, the family court did not attach Husband's Social Security benefits, nor did it make a specific award of any portion of the value of Husband's Social Security. The family court made no mention of Husband's Social Security benefits at all. The record also indicates that the family court did not threaten to incarcerate Husband if he did not pay Wife a portion of his Social Security benefits.⁶ Therefore, the family court did not violate the federal statute and there was no infringement on Husband's Social Security benefits.

Financial circumstances of both parties

⁶ In a minute entry for an enforcement review hearing, held after the hearing on the Petition to Terminate and before Husband filed his Rule 85.C motion, another family court commissioner "cautioned" Husband "that sanctions may be brought" if spousal maintenance was not paid. Husband did not appeal from this order and we do not consider this matter on appeal.

¶26 In his argument regarding the impermissible infringement of his Social Security benefits, Husband also argues that after his spousal maintenance payments to Wife, she is in a better position than he is financially. The record reflects that while Wife has voluntarily obtained employment, she is struggling to meet her needs and pay her debts, even with spousal maintenance. Because the family court found Husband voluntarily retired to reduce his spousal maintenance payments, he cannot complain that the result of his voluntary decision is error. If Wife is in a better financial position than Husband, it is a result of his voluntary decision to retire.

Attorney fees

¶27 In her response to Husband's Rule 85.C motion, Wife requested her attorney fees. After considering Wife's affidavit, Husband's response and Wife's reply, the family court ordered Husband pay \$1000 of Wife's attorney fees, which was less than half of what Wife had requested. Husband contends the family court abused its discretion when it awarded Wife her attorney fees because it did not take into consideration both parties' ability to pay the fees. When determining whether to award attorney fees, the court must consider the financial resources of both parties and the reasonableness of the positions taken throughout the case. A.R.S. § 25-324.A (Supp. 2009). The decision to award attorney fees is within the sound discretion of

the family court and will not be overturned absent an abuse of discretion. *Medlin v. Medlin*, 194 Ariz. 306, 309, ¶ 17, 981 P.2d 1087, 1090 (App. 1999); *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997).

¶28 The record before us is replete with findings that the family court found Husband's position throughout the proceedings unreasonable. In its ruling on Husband's Rule 85.C motion, the family court found that Husband had "retired in order to reduce his spousal maintenance" and that he had retired in "bad faith." The court further found that Husband's Rule 85.C motion was "unreasonable" both because it was filed nearly five months after Husband's Petition to Terminate was denied and because it was "meritless in its substance."

¶29 The family court did not make specific findings regarding the financial resources of each party. See A.R.S. § 25-324.A. The record, however, does not support Husband's assertion that the family court failed to consider the ability of both parties to pay their attorney fees. Section 25-324.A states that "the court shall make specific findings" of fact upon "request of a party." Neither party requested findings of fact in connection with the award of attorney fees. On appeal, we assume that the family court considered the evidence presented before making a decision. *Fuentes v. Fuentes*, 209 Ariz. 51, 55-56, ¶ 18, 97 P.3d 876, 880-81 (App. 2004); *Elliott v. Elliott*,

165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990) (“[A]s a general rule, an appellate court may infer that the trial court has made the additional findings necessary to sustain its judgment.”); *Bender v. Bender*, 123 Ariz. 90, 92, 597 P.2d 993, 995 (App. 1979) (“Where there is no request made for express findings of fact and conclusions of law, this Court will assume that the trial court found every controverted fact necessary to sustain the judgment, and, if there is reasonable evidence to support such finding, we must sustain the judgment.”).

¶130 At the hearing on Husband’s Petition to Terminate, both parties testified as to their financial situations. The same judge who presided over the Petition to Terminate also denied Husband’s Rule 85.C motion. In addition, the court specifically stated that it had reviewed the record of the July 30, 2008 hearing prior to ruling on Husband’s motion. Given the family court’s detailed minute entry ruling on the Rule 85.C motion, and its attention to the evidence presented, there was sufficient financial information for the family court to make a decision regarding Wife’s attorney fees request. Accordingly, the family court did not abuse its discretion in awarding attorney fees to Wife.

CONCLUSION

¶31 For the foregoing reasons, we affirm the judgment of the family court denying Husband's Rule 85.C motion.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

JON W. THOMPSON, Judge